Supreme Court No. _____
COA No. 73805-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARCEL CERDAN SAMPSON,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Other Jurisdictions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER/DECISION BELOW

Marcel Cerdan Sampson requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Sampson, No. 73805-4-I, filed May 22, 2016.[1] A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The trial court excluded testimony by an expert on memory that would have assisted the jury in evaluating the children's statements alleging sexual abuse. Did this violate Sampson's constitutional right to present a defense? RAP 13.4(b)(1), (3), (4).

2. The trial court allowed the jury to replay audiovisual recordings of the complaining witnesses' out-of-court testimonial statements, thereby emphasizing the children's statements. Does this conflict with State v. Koontz, 145 Wn.2d 650, 41 P.3d 475 (2002), and present an issue of substantial public interest? RAP 13.4(b)(1), (4).

3. Does the erroneous admission of multiple harmful hearsay statements warrant a new trial?

---

[1] The Court of Appeals entered an order denying the State's motion to publish on June 27, 2017.

4. Did the trial court's refusal to compel the testimony of two witnesses violate Sampson's constitutional right to compel the testimony of witnesses material to his defense?

5. Did multiple harmful errors occurring throughout Sampson's trial cumulatively deprive him of a fair trial?

6. Did the arbitrary labelling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violate the Equal Protection Clause? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Sampson was charged with three counts of first degree child molestation involving three children, L.R., L.H. and P.W. CP 40-41.

Before trial, Sampson moved to admit the testimony of an expert on child interview techniques and memory, Dr. Yuille. Dr. Yuille had analyzed the children's forensic interviews and identified three characteristics relevant to determining whether the allegations were the product of actual memories, as opposed to descriptions of events the children imagined or heard about. CP 135-41. The State objected and the trial court denied the motion to admit Dr. Yuille's testimony. CP 202-28; 5/28/15RP 143-44.

Also, before trial, Sampson moved to compel the attendance of N.P., who was an original charged complainant and had testified at the first trial.[2] CP 43-67. He also moved to compel the testimony of the victim advocate, who had sent an exculpatory email to the prosecutor prior to the first trial, which claimed that one of the witnesses had recanted her allegations against Sampson. Exhibit 46; 6/15/15RP 133-34. The court denied both motions. CP 77; 6/04/15RP 88, 90.

At trial, audiovisual recordings of L.H.'s and L.R.'s forensic interviews were played. 6/08/15RP 117-20; Exhibit 9, 10, 11. All three complainants testified at trial. 6/09/15RP 167-92; 6/10/15RP 19-61; 6/11/15a.m.RP 84-115; 6/11/15p.m.RP 13-84; 6/15/15RP 20-107.

During deliberations, the jury asked to replay the audiovisual recordings of the three forensic interviews of L.H. and L.R. 6/19/15RP 3; CP 265. Defense counsel objected but the court permitted the jury to replay the recordings in their entirety. 6/19/15RP 3-4, 8, 12-13.

Sampson was convicted as charged. The Court of Appeals affirmed.

---

[2] This appeal follows a second trial. After the first trial, the Court of Appeals reversed the convictions because prior bad act evidence was admitted under an unconstitutional statute, RCW 10.58.090.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court violated ER 702 and Sampson's constitutional right to present a defense by prohibiting him from calling an expert witness to help the jury evaluate the reliability of the children's statements.

The central issue in the case was the reliability of the children's statements. The State presented no other evidence of sexual contact. Yet the children's statements were inconsistent, contradictory and lacked detail. Also, the witnesses communicated with each other and with their mothers about their statements and about Sampson's prior sex offense, suggesting the possibility of taint. In light of these deficiencies, Sampson was entitled to present the testimony of Dr. Yuille to help the jury assess the reliability of the children's statements.

Dr. Yuille reviewed the transcripts and recordings of the interviews of L.H. and L.R. and a transcript of an interview with P.W. CP 131-32. Dr. Yuille determined the allegations were characterized by three features: (1) they changed with the passage of time; (2) they were "characterized by incoherent or unlikely features"; and (3) "[t]here is a suggestion that witness evidence has been affected by communication between the witnesses." CP 138. Dr. Yuille concluded the statements were not consistent with actual memories. CP 140-41.

Because Dr. Yuille was an expert on memory who could explain how and why these characteristics were relevant in deciding whether the children's statements reflected their actual memories, Dr. Yuille's testimony was relevant and helpful to the jury. It did not invade the jury's province to decide the ultimate issue of the children's credibility.

The Court of Appeals erred under ER 702 in concluding Dr. Yuille's expert testimony on memory fell within the understanding of the average juror. Numerous studies show that certain subjects like memory and perception, which were previously thought to be commonly understood, "are actually not as straightforward as thought." State v. Cheatam, 150 Wn.2d 626, 646, 81 P.3d 830 (2003). Researchers have found that "while certain tendencies of memory may be matters of ordinary sensibility, human memory is far more fallible, and indeed malleable, than most recognize." Justin S. Teff, Human Memory is Far More Fallible and Malleable than Most Recognize, 76-Jun N.Y. St. B.J. 38 (June 2004).

This Court in State v. Allen recently emphasized the importance of expert testimony in cases where the accuracy of perception and memory is at issue. State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). In that case, the issue was whether and when trial courts must

instruct juries on the difficulties of accurately perceiving and remembering faces of those who are of a different race than the observer. Id. at 613. The four-justice lead opinion noted it would have been appropriate for the defendant to present expert testimony on the issue. Id. at 624 n.6. Justices Chambers and Fairhurst wrote a special concurrence to underscore this point: "The recognition that expert testimony is admissible is very important to our justice system . . . ." Id. at 634 (Chambers, J., concurring).

The two dissenting justices explained why the issue is not one of credibility that invades the province of the jury, and not one that can be addressed through cross-examination. As Dr. Yuille stated in his report, CP 134-36, the issue is not whether the witness is lying; the problem is that the witness may genuinely believe the "facts" in his or her memory, but that memory may be inaccurate. Allen, 176 Wn.2d at 640 (Wiggins, J., dissenting).

Other courts have recognized the same principles. For example, the Texas Court of Criminal Appeals recently stated: "[A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory." Tillman v. State, 354 S.W.3d 425, 441 (Tex. Crim. App. 2011) (quoted

in State v. Lawson, 352 Or. 724, 760 n.10, 291 P.3d 673 (2012)). The Oregon Supreme Court similarly acknowledged the research mirroring that of Mr. Sampson's proffered expert, including "the alterations to memory that suggestiveness can cause," and "the difficulty of attempting to distinguish between the original memory and the new memory corrupted by later suggestiveness." Lawson, 352 Or. at 749. "Witness memory can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness." Id. at 743. Further, "[s]cientists generally agree that memory never improves." Id. at 779.

The offer of proof Sampson presented at trial is consistent with the above authority. Dr. Yuille's scientific explanations would have been helpful to the jury on the critical issue in the case—the reliability of the children's statements—and should have been admitted under ER 702. The Court of Appeals erred in concluding to the contrary.

Not only was the trial court's ruling incorrect under the Evidence Rules, it also violated Sampson's constitutional right to present a defense. A criminal accused's right to present witnesses in his own defense is guaranteed by the Sixth and Fourteenth Amendments and article I, section 22. U.S. Const. amends. VI, XIV;

Const. art. I, § 22; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Cheatam, 150 Wn.2d at 648 (citing Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)).

So long as a defendant's proffered evidence is minimally relevant, the trial court may not exclude it unless the State proves "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720. For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." Id.

Here, the evidence was of high probative value. The inaccuracy of the children's memories was the entire defense, yet Sampson was not permitted to introduce his proffered evidence supporting that defense. Sampson's constitutional right to a fair trial was violated.

2. The Court of Appeals' opinion affirming the trial court's decision to allow the jury to review the audiovisual recordings of the children's forensic interviews conflicts with State v. Koontz and violated Sampson's fundamental right to a fair and impartial jury.

Strict rules place limitations on information that may be conveyed to the jury during deliberations because "at that point the jury is engaged in judging the facts." State v. Koontz, 145 Wn.2d 650, 653,

41 P.3d 4 (2002). The federal and state constitutions guarantee a defendant the right to a fair and impartial jury. Id.; Pena-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Because a jury must remain impartial as it determines the facts, replaying testimony during deliberations is disfavored. Koontz, 145 Wn.2d at 654.

The rereading or rehearing of a witness's testimony during deliberations is error if it unduly emphasizes that testimony. United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985). "It is seldom proper to replay the entire testimony of a witness," as doing so would place undue emphasis on the testimony. Koontz, 145 Wn.2d at 647.

Allowing the jury to replay videotaped testimony raises greater concerns than simply reading from a transcript. Koontz, 145 Wn.2d at 654-57. "Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness." Binder, 769 F.2d at 600-01. These qualities of videotape testimony render it "the functional equivalent of a live witness." Id. Allowing the jury to re-play videotape testimony during deliberations is therefore "equivalent to allowing a live witness to testify a second time." Id. at 601 n.1; see also Koontz, 145 Wn.2d at 656-57 (replaying videotapes of witnesses'

testimonies effectively allows the State to recall the witnesses and have them testify a second time).

Allowing the jury to replay videotaped testimony is particularly prejudicial if the State's case turns on the credibility of the witness. In Binder, for example, the Ninth Circuit concluded that allowing the jury to re-view the videotaped testimony of the child complainants was reversible error because the only evidence of acts of sexual abuse was presented through the children's testimony. Binder, 769 F.2d at 600-01. Allowing the jury to see and hear the children's testimony a second time essentially allowed repetition of the government's case against Binder and placed undue emphasis on the testimony. Id.

In Koontz, this Court held that allowing the jury to review the videotape recordings of three witnesses who had testified at trial was reversible error because it unduly emphasized the testimony and likely affected the verdict. Koontz, 145 Wn.2d at 651, 659-60.

Similarly, in this case, allowing the jury to replay the audiovisual recordings of L.H.'s and L.R.'s testimony during deliberations placed undue emphasis on that testimony and likely affected the verdict. Although the recordings were made during forensic interviews that were conducted out of court, the children's

statements elicited in the interviews are nonetheless deemed to be "testimony." See State v. Beadle, 173 Wn.2d 97, 110-11, 261 P.3d 863 (2011) (child victim's statements made during forensic interview were "testimonial"). The statements were admitted as substantive evidence and relied upon by the State to prove the allegations. Exhibit 9, 10, 11.

Allowing the jury to replay the recordings during deliberations placed undue emphasis on them. The jury had a second opportunity to observe the demeanor and hear the voices of the child witnesses which was equivalent to allowing the State to present the testimonies of the witnesses for a second time. Binder, 769 F.2d at 600-01. No limits were placed on the replaying of the testimonies, as the interviews were replayed in their entirety. The credibility of the witnesses was the central issue in the case. See Binder, 769 F.2d at 600-01. Under these circumstances, allowing the jury to view the audiovisual recordings for a second time during deliberations violated Sampson's constitutional right to a fair and impartial jury and requires reversal. Koontz, 145 Wn.2d at 659-60.

3. The erroneous admission of harmful hearsay statements warrants a new trial.

The State conceded and the Court of Appeals agreed that the trial court erred in admitting portions of the children's out-of-court

statements that described acts of sexual abuse they witnessed against another child. Slip Op. at 8 (citing RCW 9A.44.120). The State also conceded and the Court of Appeals agreed that the trial court erred in admitting out-of-court statements made by one of the children's mothers. Slip Op. at 10. The Court of Appeals' conclusion that the errors were harmless is unreasonable and warrants review.

Improperly admitted evidence that impacts a jury's deliberations causes reversible error. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). The child hearsay testimony bolstered the in-trial testimony of the children and was decidedly prejudicial because the child witnesses did not articulate the same allegations as they had out of court. The prosecutor had to ask L.H. leading questions and tell him the answers or simply move forward without any answer. 6/09/15RP 179-93. The prosecutor also had to ask L.R. leading questions, resulting in vague allegations that Sampson "touched me" on "[m]y vagina" "[a] few times" "on my bed." 6/15/15RP 37-38, 41-43. When asked for further details, L.R. simply replied, "[h]e was touching on my vagina." 6/15/15RP 42. During deliberations, the jury asked to replay the audiovisual recordings of the interviews. 6/19/15RP 3-8. Repeating the child hearsay in a manner unauthorized by the child

hearsay statute impermissibly bolstered the State's tenuous case and impacted the jury's deliberations.

Admission of one of the mother's out-of-court statements offered through the detective's testimony was also harmful and prejudicial because it was offered to show consciousness of guilt. 5/27/15RP 14, 19.

4. The trial court violated Sampson's Sixth Amendment right to compel the attendance of two witnesses material to his defense.

Few rights are as fundamental as that of an accused to present witnesses in his own defense. The right to compel a witness material to the defense is guaranteed by the Sixth Amendment. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

The trial court erred in refusing to compel the attendance of N.P. because his testimony was material to the defense. N.P. was an original charged complainant who testified at the first trial. CP 46.

N.P.'s testimony was material to Sampson's defense that N.P.'s mother influenced her children to allege sexual abuse by Sampson in retaliation for Sampson's infidelity and domestic violence against her. CP 46-48.

The trial court also erred in refusing to compel the attendance of the victim advocate because her testimony was necessary to explain the circumstances of an exculpatory email message she had sent. In December 2010, before the first trial, the victim advocate sent an email to the prosecutor which stated that one of the children who made allegations against Sampson to the police later recanted. Exhibit 46; 6/15/15RP 133-34.

Plainly the email message sent by the victim advocate was material because it supported the theory that this child had talked to the other witnesses and influenced their statements, and it confirmed that the witnesses' statements changed over time for improper reasons.

The trial court recognized the relevance and admissibility of the email message but denied the motion to compel the testimony of the victim advocate. 6/04/15RP 88, 90.

Sampson should have been allowed to call the victim advocate so that he could ask her about the circumstances of the email message. The message was exculpatory and material to the defense that the allegations were manufactured. By refusing to compel the testimony of the victim advocate, the trial court violated Sampson's Sixth Amendment rights.

5. The cumulative effect of multiple harmful trial errors denied Sampson a fair trial.

Under the cumulative error doctrine, reversal is required when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because of (1) court's severe rebuke of defendant's attorney in presence of jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel); Taylor v. Kentucky, 436 U.S. 478, 487-88, 487 n.15, 490, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (several errors may have cumulative effect of violating due process guarantee of

fundamental fairness); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) ("Although each of the above errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted."); U.S. Const. amend. XIV; Const. art. I, § 3.

Because several trial errors cumulatively denied Sampson a fair trial, his convictions must be reversed and remanded for a fair trial.

6. The arbitrary labeling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); U.S. Const. amend. XIV. When analyzing an equal protection claim, the Court applies strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 US. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here—physical liberty—is the prototypical fundamental right. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens applied. Under either strict scrutiny or rational basis review, the classification at issue is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The Legislature determined that the State has an interest in punishing repeat criminal offenders more severely than first-time

offenders. For example, defendants who twice previously violated no-contact orders are subject to a significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). And defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(33); RCW 9.94A.570. But the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels "elements" of a crime or "sentencing factors" which have been attached to them.

Where prior convictions that increase the maximum sentence available are termed "elements," they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact

order as a felony. Oster, 147 Wn.2d at 146. In neither example did the Legislature label the facts elements. Courts simply treat them as such.

But where, as here, prior convictions that increase the maximum sentence available are termed "sentencing factors," they need only be proved to the jury by a preponderance of the evidence. See State v. Witherspoon, 180 Wn.2d 875, 892-93, 329 P.3d 888 (2014). Just as the Legislature never labeled the facts in Oster or Roswell "elements," the Legislature never labeled the fact at issue here a "sentencing factor." Instead it is an arbitrary judicial construct. This classification violates the Equal Protection Clause because the government interest in either case is *exactly the same*: to punish repeat offenders more severely.

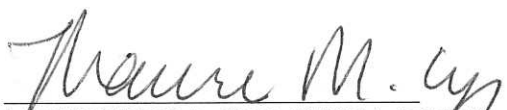
If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "three strikes" context but not in other contexts because the punishment in the "three strikes" context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. But it makes no sense to say greater procedural protections apply where the necessary facts only marginally increase punishment but need not apply where the necessary facts result in the most extreme increase possible.

As the Supreme Court explained, "merely using the label 'sentencing enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." Skinner, 316 U.S. at 542. The imposition of a sentence of life without the possibility of parole violated the Equal Protection Clause. Sampson should be resentenced within the standard range.

E. CONCLUSION

For the reasons provided, this Court should grant review.

Respectfully submitted this 27th day of July, 2016.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MARCEL CEDRAN SAMPSON, Appellant.	)	No. 73805-4-I DIVISION ONE UNPUBLISHED OPINION FILED: May 22, 2017

APPELWICK, J. — A jury convicted Sampson of three counts of first degree child molestation. On appeal, he argues that the trial court erroneously excluded his expert, admitted prejudicial hearsay, failed to compel testimony from two witnesses, and allowed two exhibit videos to be replayed to the jury. He also argues that his persistent offender sentence violates equal protection and that he should not be liable for appellate costs. We affirm.

FACTS

Marcel Sampson was romantically involved with Fuhyda Tucker. Tucker discovered that Sampson was also seeing other women. One day, in March 2009, while Sampson stopped by Tucker's apartment, Tucker looked through Sampson's phone for evidence of his infidelity. Instead, Tucker found a video of her daughter, P.W., taking off her clothes and preparing to shower.

Tucker notified the police. After discovering more about Sampson's past, she also notified Janine Thornton, with whom Sampson had also been romantically involved.

A few months later, in June 2009, Thornton's niece, 13 year old P.R., reported to her school principal that a man named Marcel had sexually assaulted her. The principal alerted Detective Donna Stangeland. Detective Stangeland then interviewed P.R. P.R. disclosed that some of the assaults had occurred at Thornton's house.

Detective Stangeland contacted Thornton, and notified her of P.R.'s allegations. Thornton has five children, including L.H. and L.R. Sampson would occasionally babysit L.H. and L.R. Thornton admitted to Stangeland that L.H. and L.R. had told her that Sampson had sexual contact with them. Thornton did not disclose this abuse to the authorities until being contacted by Stangeland because she was fearful of losing custody of her children. L.R. had told Thornton that Sampson had drank L.R.'s urine, and tried to touch her genitals. L.H. had told his mother that Sampson had tried to sodomize him, that "white stuff" was coming out of Sampson's penis, and that Sampson had put L.H.'s penis in his mouth.

In 2011, Sampson was found guilty of first degree rape of child, first degree child molestation, tampering with a witness, domestic violence felony violation of a court order, and two counts of communication with a minor for immoral purposes. This court overturned the convictions of rape of a child, child molestation, and communicating with a minor for an immoral purpose, because

the trial court erroneously admitted evidence of Sampson's prior bad acts. State v. Sampson, No. 67868-0-I; slip op. at 15-16 (Wash. Ct. App. July 1, 2013) (unpublished), http://www.courts.wa.gov/opinions/pdf/678680.pdf.

Sampson was eventually recharged with three counts of child molestation in the first degree, and two counts of communication with a minor for immoral purposes. At the second trial, he was convicted of the three counts of child molestation in the first degree for his abuse of L.R., L.H., and P.W. But, he was acquitted of both counts of communication with a minor for immoral purposes, which involved L.R. and another child, L.R. 1998.[1] He was sentenced to life in prison as a persistent offender. Sampson appeals.

DISCUSSION

Sampson makes seven arguments on appeal. First, he argues that the trial court erroneously excluded expert testimony. Second, he argues that the trial court committed reversible error by admitting hearsay testimony. Third, he contends that the trial court erred by not compelling the attendance of two witnesses. Fourth, he argues that the trial court erred in allowing the jury to review three video exhibits. Fifth, he alleges that the foregoing errors amount to cumulative error. Sixth, he argues that his persistent offender life sentence violates equal protection. Finally, he also contends that he should not be liable for appellate costs due to his indigency.

---

[1] L.R. 1998 was the alleged victim of count V, communicating with a minor for immoral purposes, for which Sampson was found not guilty. L.R. 1998 is L.R. and L.H.'s cousin. We identify her by initials and birth year (L.R. 1998) to distinguish her from the other child with initials L.R.

I. Exclusion of Expert Testimony

Sampson first argues that the trial court erred in excluding expert testimony. Sampson planned to call Dr. John Yuille as an expert witness. Dr. Yuille is a professor emeritus of psychology at the University of British Columbia. His research is in human memory and interviewing techniques.

Yuille's report discussed evaluating child witnesses' credibility. Using what he describes as "statement analysis," Dr. Yuille purports to analyze whether a child's recollections are the product of actual memories. He concludes, based on statement analysis, that the child witnesses' memories here were likely "contaminated," and that it is "impossible to support the credibility of the allegations." He cited three reasons for this conclusion: the children's allegations changed with the passage of time, the allegations were characterized by "incoherent or unlikely features," and that the evidence may have been influenced by communication between witnesses.

The State moved to exclude Dr. Yuille's testimony. The trial court granted this motion:

> It . . . is based upon things that everybody deals with in everyday life, which is conflicting statements, resolving contradictory statements between people, statements that change over time, statements being influenced by what other people have said and suggestibility.
>
> And furthermore, probably most importantly, it clearly invades the province of the jury. I mean, it's the jury's job to decide credibility, and that's exactly what Dr. Yuille is proposing to do, is to basically comment on the credibility of the witnesses here, and that's what the jury needs to decide. So I'm not going to allow Dr. Yuille to testify about that before the jury.

On appeal, Sampson argues that the trial court abused its discretion, because Dr. Yuille would have assisted the jury in making sense of inconsistencies in the children's stories. Sampson contends that Dr. Yuille would not simply opine on whether the children were lying. Rather, Sampson argues, Dr. Yuille would have assisted the jury in evaluating the reliability of the child witnesses' statements, which he argues is outside the competence of ordinary laypersons.

The admissibility of expert testimony is governed by ER 702, and requires a case by case inquiry. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). Under ER 702, a qualified expert may testify regarding scientific, technical, or other specialized knowledge if it will assist the trier of fact to understand the evidence or to determine a fact in issue. To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and that the testimony will assist the trier of fact. In re Det. of McGary, 175 Wn. App. 328, 338-39, 306 P.3d 1005 (2013)

This court reviews a trial court's decision on whether to admit expert testimony for abuse of discretion.[2] See State v. Kalakosky, 121 Wn.2d 525, 541,

[2] Sampson acknowledges that exclusion of expert testimony under the rules of evidence is reviewed for abuse of discretion. But, he also argues that the exclusion of the expert testimony infringed on his constitutional right to present a defense. He therefore argues that the panel should review this aspect of Dr. Yuille's exclusion de novo. But, a defendant's right to present a defense is subject to established rules of evidence designed to assure fairness and reliability. State v. Lizarraga, 191 Wn. App. 530, 553, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022, 369 P.2d 501 (2016). Therefore, "a defendant's interest in presenting relevant evidence may 'bow to accommodate other legitimate interests in the criminal trial process.' " Id. (quoting Untied State v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). Accordingly, we review the exclusion of Dr. Yuille's testimony for abuse of discretion.

852 P.2d 1064 (1993). A trial court's discretion is broad, and its decision should be reversed only if it rests on unreasonable or untenable grounds. State v. Rafay, 168 Wn. App. 734, 783-84, 285 P.3d 83 (2012).

Sampson relies primarily on State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). There, a key fact was identification of the defendant, which was in part based on his race. Id. at 614-15. A plurality of the Supreme Court held that the trial court did not abuse its discretion in refusing to instruct the jury that it is more difficult for some individuals to give eyewitness identifications of members of another race. Id. at 614-15, 624. Despite this holding that seemingly cuts against Sampson, he cites Allen because the plurality noted that expert testimony would be an available tool on the issue of cross racial identification.[3] Allen, 176 Wn.2d at 624 n.6.

Nevertheless, Allen does not mandate admission of Dr. Yuille's testimony. The plurality's only comment on expert testimony was a two sentence footnote that noted that experts are available to the parties. Id. at 624 n.6. The court did not explore the scope of expert testimony that would be admissible, or declare that a trial court must permit such testimony. See id. The court did not indicate that these experts are entitled to comment on the truthfulness of witnesses' testimony. See id. Moreover, the issue in Allen was a cautionary instruction. Id.

[3] Sampson also cites State v. Lawson, 352 Or. 724, 291 P.3d 673 (2010) as persuasive authority. Similar to Allen, the Oregon Supreme Court held that expert testimony may be admissible to "educate the trier of fact concerning variables that can affect the reliability of eyewitness identification." Id. at 761. Like Allen, this case addressed eyewitness identification evidence, not credibility. Id. at 727.

at 614. But, here the issue is whether an expert must be permitted to tell the jury whether another witness is in fact telling the truth. And, Allen addressed unique issues related to cross-racial identification, not commonly understood indicia of credibility such as inconsistent stories or witness collusion. Id. at 615.

Experts may not state an opinion about a victim's credibility, because such testimony invades the province of the jury to weigh the evidence and decide the credibility of witnesses. State v. King, 131 Wn. App. 789, 797, 130 P.3d 376 (2006). But, Dr. Yuille's report did just that. It explicitly stated that it was "impossible to support the credibility of the allegations." The three bases that Dr. Yuille's analysis relied upon—inconsistencies, "incoherent or unlikely features," and potential witness collusion—were all within the understanding of an ordinary layperson. They did not require expert testimony for the jury to understand.

The trial court did not abuse its discretion in excluding Dr. Yuille's testimony.

II. Hearsay

Sampson next contends that the trial court committed reversible error by admitting hearsay statements of the children and of the detective.

A. Child Hearsay

Sampson contends that the trial court erroneously admitted statements that were not admissible under the child hearsay exception. A child's out-of-court statement about sexual acts performed with or on the child is not subject to the prohibition on hearsay if the trial court finds that the statement is sufficiently reliable and the child testifies at the hearing. RCW 9A.44.120. By its terms, this

rule does not apply to a statement by a child describing an act of sexual contact performed on a different child. State v. Harris, 48 Wn. App. 279, 284, 738 P.2d 1059 (1987).

Video recordings of interviews of L.H. and L.R. were admitted as exhibits.[4] Sampson argues that statements made by L.H. and L.R. about acts that they witnessed Sampson perform on the other were not admissible, because RCW 9A.44.120 applies only to statements about acts against the child individually.

The State concedes that the trial court erred in admitting out-of-court statements by L.H. and L.R. about acts not performed on themselves personally. But, the State contends that the error was harmless, because, during their in court testimony, L.H. and L.R. repeated their out-of-court statements about acts that they saw Sampson perform on the other.[5] Sampson contends that the error requires reversal because it bolstered the credibility of the children's in court testimony.

We will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). An evidentiary error is not prejudicial unless there is a reasonable probability that, without the error, the

---

[4] Exhibit 10 is a video of a child interview specialist's interview with L.R. Exhibit 11 is a video L.H.'s interview with the same specialist. Transcripts of L.R.'s and L.H.'s interviews were admitted as exhibits 15 and 16, respectively.

[5] The State also argues that this argument was not preserved. Sampson objected to the admission of the videos on hearsay grounds, but did not identify the specific portions of the video that are hearsay. This objection is sufficient to warrant review.

outcome of the trial would have been different. See State v. Gower, 179 Wn.2d 851, 854-55, 321 P.3d 1178 (2014). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

L.R.'s out-of-court interview focused on Sampson's acts against her. But, multiple times during the interview contained in exhibit 15, L.R. also described Sampson's sexual contact with her brother, L.H. She stated that she witnessed Sampson touch L.H.'s bottom, and put his "privacy" in L.H.'s "butt." But, during her trial testimony, L.R. testified to witnessing the same acts. The hearsay in the interview exhibit was merely duplicative of her testimony. And, L.H. testified at trial that Sampson, more than once, touched his "bottom" with "[h]is thing." L.H. also testified that Sampson had put his mouth on his penis. L.R.'s interview statements about Sampson's acts against L.H. that she witnessed were merely duplicative of her in court testimony.

L.H.'s out-of-court interview focused on Sampson's acts against L.H. But, L.H. testified that Sampson had touched L.R. on her bottom. L.R. also testified about Sampson's other sexual acts against her. The only hearsay from L.H. about L.R. that Sampson points to is L.H.'s statement that Sampson had "drank his sister's pee." L.H. did not repeat this claim in his testimony. But, her mother, Thornton, testified that L.R. had told her that Sampson had "drunk her pee." L.R.'s statement to her mother qualifies for admission as child hearsay under RCW 9A.44.120, because it is a statement by L.R. about Sampson's acts against

L.R. And, Sampson did not object to Thornton's testimony about L.R.'s statement.

There is not a reasonable probability that excluding the hearsay from the videos and their transcripts would have changed the result in this case. The error was harmless.

B. Detective's Testimony

Sampson also contends that the trial court erred in allowing Detective Stangeland to testify regarding statements made by Thornton.

Detective Stangeland testified that Thornton called Stangeland and told her that Sampson's mother had banged on her front door and she was worried that this was an act of retaliation. Pretrial, the State had stated it would offer this evidence from Thornton herself, as evidence of Sampson's consciousness of guilt. But, it did not. Instead, it came into evidence in the form of hearsay testimony, with Stangeland testifying about what Thornton had told her. Sampson objected on hearsay grounds, but was overruled. The State concedes that the trial court should have sustained this objection, but argues that the error was harmless.

Sampson contends that this error warrants reversal because it shows Sampson's consciousness of guilt. But, there were numerous other pieces of evidence that showed his consciousness of guilt. Most notably, Sampson himself testified that he attempted to pay Thornton and Tucker to leave him alone. One of Sampson's girlfriends, Christina Rock, testified that while Sampson was in jail, he asked her to get rid of a laptop. And, Rock confirmed

Sampson's own statements about paying off Thornton and Tucker, testifying that Sampson had discussed it "[d]ozens of times."

Given that Sampson admitted to attempting to pay Thornton, the hearsay evidence that his mother tried to intervene was harmless. The erroneous admission of the hearsay testimony from Stangeland was harmless.

III. Attendance of Witnesses

Sampson contends that the trial court erred in not compelling the attendance of two witnesses at trial.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." The defendant's right to compel witness testimony is part of the right to present a defense. State v. Wimbish, 100 Wn. App. 78, 82, 995 P.2d 626 (2000). But, although guarded jealously, that right is not absolute. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The defendant's right to obtain witnesses in his favor applies only to witnesses that are material to the defense. Id. And, the defendant bears the burden of establishing materiality. Wimbish, 100 Wn. App. at 82. We review a trial court's decision on whether to compel witness testimony for abuse of discretion. See State v. Lodge, 42 Wn. App. 380, 391-92, 711 P.2d 1078 (1985).

A. N.P.

First, Sampson argues that the trial court should have compelled the testimony of N.P. N.P. is Tucker's child and P.W.'s brother. N.P. testified at the

first trial. But, the State declined to pursue charges for acts involving N.P. at the second trial. Sampson nevertheless sought to compel N.P.'s testimony because, he contends, N.P.'s allegations against Sampson were inconsistent, and therefore tended to suggest a lack of credibility. And, even though the second trial did not involve charges relating to N.P., Sampson argues that N.P.'s inconsistent story casts doubt about the charges involving Tucker' daughter, P.W.

N.P. resides in California. Before an out-of-state witness can be compelled to testify in accordance with RCW 10.55.060, the party seeking the presence of the witness must establish that the witness' testimony is material. Wimbish, 100 Wn. App. at 83. The mere assertion that witnesses are material is insufficient. Id. Rather, the party seeking attendance of the witness must submit an affidavit or other competent evidence presenting facts to which the witness will testify. Id.

Sampson offered two sources of evidence in support of his motion. First, he provided a declaration from his attorney that stated N.P. was a material witness, because his testimony might reveal his mother's motives to influence her children to frame Sampson. But, the declaration does not purport that Tucker in fact instructed her children to frame Sampson. Instead, it points only to circumstances surrounding N.P.'s allegations that show N.P.'s mother disliked Sampson. Second, as an appendix to his motion, he provided a copy of the previous appellate decision, a portion of which discussed the inconsistency of N.P.'s allegations. But, the opinion's discussion of N.P.'s prior testimony merely

states that N.P. failed to articulate certain details of the alleged sexual abuse. Such evidence does not go to the defense's theory that Sampson is being framed.

Moreover, Tucker, N.P.'s mother, testified. Given that Tucker's motive to fabricate allegations against Sampson was the primary reason Sampson sought N.P.'s testimony, the importance of N.P.'s testimony was reduced. And, the trial court noted that Sampson could renew his request to compel N.P., should he lay a more specific foundation regarding the material testimony he would elicit from N.P. Sampson never did. Given these facts, the trial court did not abuse its discretion in declining to subpoena N.P.

B. Victim Advocate

Second, Sampson argues that the trial court should have compelled the testimony of the victim advocate. Sampson introduced an allegedly exculpatory e-mail message as an exhibit. The message, sent by the victim advocate to the prosecutor, stated that L.R. 1998's mother said that L.R. 1998 said "it didn't happen to her and that [P.W.] told her to say those things." The allegation involving L.R. 1998 was that Sampson had shown pornography to L.R. 1998.

Sampson sought the victim's advocate's testimony about the circumstances that led to this potentially exculpatory e-mail. The trial court denied this motion, determining that the advocate's testimony was not necessary. Detective Stangeland, testified about her knowledge of the e-mail's substance. She stated that she knew nothing besides what the e-mail stated. And, in their respective testimony, neither L.R. 1998 nor her mother remembered L.R. 1998

recanting her story. The probative value of the advocate's testimony was likely minimal, because the jury found Sampson not guilty of the only charged crime that involved L.R. 1998 without the benefit of it.

And, under RCW 5.60.060(7), an advocate may not testify about communication between the advocate and the sexual abuse victim. Therefore, the advocate would not have been able to testify about what L.R. 1998 had told her that led to the message. The trial court did not abuse its discretion in declining to compel the victim advocate's testimony.

IV. Replay of Child Testimony

Sampson contends that the trial court erred in allowing the jury to review video exhibits.

The jury requested to review three video exhibits. Two videos were of L.R.'s interviews with a child interview specialist. One video was of L.H.'s interview with the child interview specialist. In the videos, both children allege that Sampson engaged in sex acts with themselves and others. Over defense counsel's objection, after hearing arguments from both sides, the trial court granted the jury's request:

> I'm going to grant that request and we'll play those videos for you. I want to let you know that we're just going to play the three videos straight through, we're not going to go back and forth or rewind or anything like that. You're not to talk to each other while the videos are playing.
>
> After it's all done, you can go back in the jury room and talk about it as much as you want, because that's part of your deliberative process, but we're just going to provide -- play the videos for you and that will be it.

We review a trial court's decision to replay testimony for the jury during deliberations for abuse of discretion. State v. Morgensen, 148 Wn. App. 81, 86-87, 197 P.3d 715 (2008). CrR 6.15(f)(1) provides that:

> In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence.

Viewed in light of the principle that a jury must remain impartial as it determines the facts, reviewing testimony during deliberations is disfavored. State v. Koontz, 145 Wn.2d 650, 654, 41 P.3d 475 (2002).

Sampson argues that the same concerns that led the court to reverse in Koontz are also present in this case. In Koontz, our Supreme Court held that replaying video of trial testimony requires trial courts to apply protections against "undue emphasis" that consider the effect and manner of video replay. 145 Wn.2d at 657. Specifically, the Koontz video exposed views of the witnesses' demeanor not previously available to the jury. Id. at 660. The jury was looking for the witnesses' "facial expressions and whatnot." Id. at 659.

The court held that replaying the video of trial testimony in this manner was error. Id. at 660. It reasoned that courts should balance the need to replay the testimony with procedural safeguards, such as limiting the amount of times the jury can review the video, to prevent juries from overemphasizing the evidence. Id. at 657. Koontz instructs that "the unique nature of videotaped testimony requires trial courts to apply protections against undue emphasis that consider both the effect and the manner of video replay." Id.

But, Koontz is clearly distinguishable.[6] Most notably, the Koontz court explicitly stated that replaying videotaped trial testimony should not be treated under the same standard as an admitted sound or video exhibit. Id. at 659. And, the evidence at issue here was an admitted exhibit, not videotaped trial testimony. And, the trial court allowed the jury to review the testimony only once, outside the jury room, without discussion while the videos were being played. The circumstances here were different than in Koontz.

We hold that the trial court did not abuse its discretion in replaying the video exhibits.

V. Cumulative Error

Sampson also argues that the foregoing errors amount to cumulative error. Cumulative error warrants reversal when there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The only errors we find are the two harmless evidentiary errors. They went to different issues. The error relating to Stangeland's testimony went to consciousness of guilt. And, it was inconsequential given that Sampson himself

---

[6] Sampson also cites United States v. Binder, where child credibility was also at issue. 769 F.2d 595, 600-01 (9th Cir. 1985), overruled on other grounds by United States v. Morales, 108 F.3d 1021 (9th Cir. 1997). But, the Binder court found an abuse of discretion precisely because the court did not take critical precautions. Id. at 601. First, some communications between the judge and jury occurred without consulting counsel or the defendant. Id. at 598. And, the videotape was replayed in the privacy of the jury room. Id. The court also allowed the jury to skip preliminary portions of the tape. Id. None of these circumstances are present here. Binder is distinguishable.

admitted to attempting to pay Thornton and destroy a laptop. The error relating to the children's hearsay in their out-of-court interviews went to credibility. But, the children's testimony in court allowed the jury to assess their credibility directly, independent of whether their prior hearsay statements were factually the same. The isolated hearsay statements, when combined with Stangeland's hearsay testimony, do not rise to cumulative error. Their cumulative effect did not deprive Sampson of a fair trial.

VI. Equal Protection

Sampson was sentenced to life in prison due to his status as a persistent offender. When a prior conviction is an element of a crime rather than a basis for aggravating a sentence, the State must prove its existence to a jury beyond a reasonable doubt. State v. Langstead, 155 Wn. App. 448, 453, 228 P.3d 799, (2010). Sampson argues that his sentence violates equal protection, because his prior offenses were not elements, but rather "sentencing factors" that needed to be proven by only a preponderance of evidence. He contends that we should apply strict scrutiny to the persistent offender sentencing factor. And, he argues that, under either strict scrutiny or rational basis, the classification violates equal protection.

But, this court has rejected virtually identical arguments on multiple occasions. For example, in Langstead, this court held that a persistent offender life sentence satisfied rational basis review. Id. at 456-57; see also State v. Witherspoon, 171 Wn. App. 271, 305, 286 P.3d 996 (2014) ("[T]here is a rational basis for distinguishing between 'persistent offenders' and 'nonpersistent

offenders.' "). In accord with these previous decisions, we hold that Sampson's persistent offender sentence does not violate equal protection.

VII. Costs on Appeal

Sampson asks that we deny any request for costs on appeal because the trial court deemed him indigent. At oral argument, the State withdrew its opposition to Sampson's request to waive costs due to indigency. We therefore hold that, due to Sampson's indigency, the State is not entitled to costs on appeal.

We affirm.

WE CONCUR:

Trickey, ACJ

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73805-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent David Seaver, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[david.seaver@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 27, 2017

WASHINGTON APPELLATE PROJECT

July 27, 2017 - 4:26 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	73805-4
Appellate Court Case Title:	State of Washington, Resp. vs. Marcel Sampson, App.
Superior Court Case Number:	09-1-07421-2

The following documents have been uploaded:

- 738054_Petition_for_Review_20170727162545D1088344_4068.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20170727_160952.pdf

A copy of the uploaded files will be sent to:

- david.seaver@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Maureen Marie Cyr - Email: maureen@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20170727162545D1088344